Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-region InterLATA Services in South Carolina	))))))	CC Docket No. 97-208

OPPOSITION OF AT&T CORP. TO
BELLSOUTH'S SECOND MOTION TO STRIKE

AT&T Corp. respectfully submits this opposition to BellSouth's Motion to Strike AT&T's December 8, 1997 Letter (filed Dec. 19, 1997) ("Motion"). For the reasons set forth below, the motion not only lacks any merit, but confirms that the Commission should disregard the new material submitted with BellSouth's reply.

INTRODUCTION

On December 8th, 1997, AT&T submitted a letter in this Docket addressed to the Secretary of the Commission that identified aspects of BellSouth's reply submission to which the Commission, pursuant to the rules it reaffirmed and applied in the Ameritech Michigan Order, should not give any weight. Letter of Roy E. Hoffinger to Magalie R. Salas (Dec. 8th, 1997) ("AT&T Letter" or "Letter"); see Ameritech Michigan Order ¶ 59. BellSouth now responds with a motion to strike, claiming that the letter should be disregarded because it was not clearly marked as an "ex parte" submission, and that BellSouth's decision to submit new material on reply was, in any event, justifiable. Neither argument has any merit.

I. AT&T'S DECEMBER 8, 1997 LETTER WAS AN EX PARTE FILING, AND BELL SOUTH SUFFERED NO PREJUDICE THAT WOULD REQUIRE THE COMMISSION TO STRIKE IT

BellSouth's only argument in support of striking AT&T's Letter is a procedural one. It claims that AT&T's Letter was not clearly marked as an "ex parte" submission, and that it did not conform to the rules that govern non-dispositive motions. Motion at 2. AT&T's Letter, however, is plainly an ex parte submission under the Commission's rules: It was submitted to the Secretary "no later than than the next business day after the presentation," it "clearly identif[ied] the proceeding to which it relates," 47 C.F.R. § 1.1206, and, even though the Commission's rules do not require it, the Letter was, by BellSouth's admission (Rabkin Aff. ¶ 2), served on BellSouth's counsel the next day. AT&T's decision to identify the improper aspects of BellSouth's reply submission in an ex parte letter, rather than a motion to strike, was entirely proper in the circumstances presented in this application. Because the Commission has made clear that it intends to exercise its discretion "whether to accord new factual evidence any weight," Ameritech Michigan Order ¶ 59, a formal motion to strike is not required.

Contrary to BellSouth's claims, the omission of the ex parte label did not transform the Letter into a "non-dispositive motion," and certainly did not "abridge[] BellSouth's opportunity to reply." Motion at 2. It is apparent -- from both the Letter's form and content -- that the Letter is not a motion to strike. Indeed, the Letter never requested the Commission to "strike" any part of BellSouth's reply submission, but only to use its discretion and not give weight to BellSouth's improperly submitted evidence and argument. Notably, BellSouth itself did not treat the Letter as a motion to strike, waiting to file its response until ten days after it received AT&T's Letter.

In all events, even though AT&T did not place an "ex parte" label on its Letter, BellSouth was in no way prejudiced either by this omission or by receiving the Letter the day after it was filed -- which is beyond what the Commission's rules require. AT&T filed the Letter promptly after receiving BellSouth's reply submission, and BellSouth was afforded ample time to file its response before the ninety-day period expired, which it did. Accordingly, BellSouth was not and could not be prejudiced by AT&T's filing of the Letter as an ex parte submission, and the Commission should not only refuse to strike it, but, as the next section shows, should rely on it in evaluating BellSouth's application.

II. AT&T'S LETTER PROPERLY IDENTIFIED INSTANCES WHERE BELLSOUTH'S REPLY SUBMISSION VIOLATED THE COMMISSION'S RULES

AT&T's December 8th Letter showed that BellSouth's reply submission was procedurally improper under the Commission's well-established procedures in section 271 proceedings because BellSouth waited until its reply to make legal arguments and introduce factual evidence that should have been included with its initial application, or that post-dated the date for third-party comments. BellSouth's Motion to Strike does not dispute many of the key facts. For example, BellSouth nowhere denies or defends its decision to submit evidence that post-dates the date that third-party comments were due -- submissions that are never permitted under the Commission's rules. In addition, BellSouth's motion makes clear that, in many instances, having initially argued that certain evidence was not required, BellSouth decided to abandon that legal position on reply and provide the evidence. This is precisely what the Commission's rules forbid. Finally, BellSouth's repeated claim that it could not have anticipated certain CLEC arguments is disingenuous and belied by the record. In short, it is clear that BellSouth, by

"withhol[ding] evidence [and argument] until the reply round of comments, when [it is] immune from attack," violated the Commission's rules. Ameritech Michigan Order ¶ 52.

A. UNEs

On UNEs, BellSouth waited until its reply to describe how it proposes to provide usage data necessary for CLECs to bill IXCs for access services. BellSouth now claims that it did not "anticipate [AT&T's] objection[s]" because AT&T "never inquired in preliminary State proceedings how BellSouth would make access charge billing information available to CLECs who purchase unbundled network elements." Motion at 3 (emphasis added). This excuse is misleading: throughout its state proceedings, BellSouth argued that CLECs purchasing the unbundled switch were not entitled to collect access charges at all, and that BellSouth therefore was not required to provide such billing information in any form. BellSouth's adamant refusal to provide such information mooted any consideration of "how" BellSouth would provide this data.

Moreover, once BellSouth partially retreated from its categorical refusal to provide the needed information, AT&T made abundantly clear -- before BellSouth's FCC filing -- that "AT&T needs to know how BellSouth will make these usage recording categories available to AT&T," particularly "[i]f BellSouth cannot transmit these usage recordings electronically."[1]

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[1] See Letter of W.J. Carroll (AT&T) to F.D. Ackerman (BellSouth), at 2 (Aug. 29, 1997) (emphasis added) (Attachment 8 to Affidavit of J. Carroll, Exh. D to AT&T Comments). Indeed, in responding to this letter, BellSouth itself admitted that "BellSouth and AT&T need to come to an agreement of the formatting of these access records." Letter of Mark Feidler (BellSouth) to W.J. Carroll (AT&T), at 4 (Sept. 12, 1997) (Attachment 1 to Affidavit of James A. Tamplin, Jr., Exh. K to AT&T Comments).

BellSouth therefore "had reason to believe" (Motion at 3) that "how" it would provide access charge billing information would be at issue in its application, and should have included such information in its initial application.

Finally, BellSouth errs in claiming that the Commission does not require that it provide billing information "through any particular method." Motion at 4. The Commission has not yet addressed the question of what method constitutes reasonable and nondiscriminatory provision of access billing information (see Ameritech Michigan Order ¶ 317), and BellSouth's tardy assertion on reply that manual provision is sufficient simply denied AT&T an opportunity to respond.

B. CSAs

The Commission should also refuse to consider BellSouth's new arguments that attempt to justify its restrictions on resale of CSAs. BellSouth claims (Motion at 4) that "it expected that CSAs would not be a significant issue in this proceeding." This is not credible. AT&T repeatedly pointed out to BellSouth and to state commissions -- in advance of BellSouth's filing -- that BellSouth's CSA restrictions violated this Commission's existing rules. See December 8th Letter at 3 & Exh. 1. It simply cannot be surprising that AT&T would raise this violation with this Commission.

BellSouth also expresses its shock at AT&T's objections because it believes that the SCPSC's decision on CSAs is "determinative." Motion at 5. That position is not only legally erroneous, see AT&T Reply Comments at 22, it demonstrates further why BellSouth's reply submission was improper: In its initial application BellSouth knowingly chose to forego

presenting additional support for its resale restrictions because it believed that the SCPSC's decision was determinative. The Commission's rules preclude BellSouth from reversing course on reply and asserting new defenses to its restrictions. Ameritech Michigan Order ¶ 52. Any other policy would prevent AT&T and other CLECs from responding, "except in ex partes." Id. Accordingly, the Commission should review BellSouth's resale restrictions based on its original justification -- that the State's decision is conclusive -- rather than the new arguments it advanced on reply.

C. OSS

As for OSS, BellSouth's motion to strike does not even attempt to rebut AT&T's showing in the December 8th Letter (at 4) that BellSouth's reply submissions contain information that post-dates AT&T's initial comments, which, again, is permitted "under no circumstance." Ameritech Michigan Order ¶ 51. Accordingly, that information should "not receive any weight." Id.

Moreover, BellSouth's assertions that it may use reply submissions and post-filing demonstrations to "describ[e] ongoing improvements" to its systems -- no matter how "specific" (Motion at 5) -- are also squarely contradicted by the Commission's rules that a "section 271 application must be complete on the day it is filed." Ameritech Michigan Order ¶ 50. BellSouth never denies that its post-filing demonstrations "display[] upgrades" to its LENS system installed since September 30th, but only asserts that the Commission will not be "fool[ed]" by such demonstrations. Motion at 5. But that assertion ignores the entire focus of the Commission's rules precluding such post-filing conduct, which recognizes that it "impairs

the Commission's ability to evaluate the credibility of such new information" and provides "no opportunity to comment on the veracity of such information, except through the submission of ex partes." Ameritech Michigan Order ¶¶ 52, 54. AT&T filed its December 8th ex parte precisely for this reason, which is why this Commission should not give any weight to BellSouth's patently improper post-filing submissions and demonstrations.

D. Performance Measures

BellSouth's claims relating to performance measures provide one of the most egregious examples of BellSouth's disregard for the Commission's rules. As to the new BellSouth evidence identified by AT&T in the December 8th Letter, BellSouth admits that it "was not included in its [initial] Application" (indeed, it even agrees with AT&T that the Commission should not give this data "any weight"). Motion at 7. BellSouth nonetheless contends that it was entitled to withhold such information from its initial application because an applicant, rather than the Commission, has the authority to decide what type of data are "appropriate measure[s] of nondiscrimination." Id.; see also BellSouth Reply Br. 51 ("It is for BellSouth -- not the Commission . . . -- to determine what evidence to present" to show nondiscriminatory performance). Here again, BellSouth cannot have it both ways. Once it stakes out a position in its initial application that certain evidence is not required, it must defend that position in its reply -- not change course and offer the previously withheld evidence.

E. Section 272

AT&T's December 8th Letter (at 6) also demonstrated that it was improper for BellSouth to rely in its reply submission on agreements between itself and BSLD that it did not disclose until after the October 20th deadline for initial third party comments, which is never permitted. Ameritech Michigan Order ¶ 51. BellSouth again does not deny that its disclosure was untimely, but nonetheless excuses this blatant violation by claiming that it "should [not] conceal facts the Commission may consider relevant." Motion at 8. But AT&T's Letter did not ask, and the Commission's rules do not require, BellSouth to "conceal facts," but only to reveal those facts in its initial application, rather than after third parties have already commented on that application. Because BellSouth admittedly violated this principle, the Commission should disregard the noted portions of BellSouth's reply.

CONCLUSION

For the reasons stated above, the Commission should deny BellSouth's motion to strike AT&T's December 8th Letter.

Respectfully submitted,

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December 23, 1997

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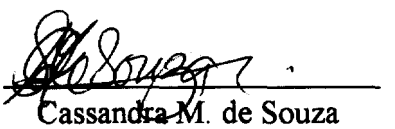
CERTIFICATE OF SERVICE

I, Cassandra M. de Souza, do hereby certify that I caused a copy of the foregoing Opposition of AT&T to BellSouth's Second Motion to Strike to be served this 23rd day of December, 1997, by First Class mail on all parties on the attached service list.



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